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In the Supreme Court of the United States

OCTOBER TERM, 1982

THALIA KELLY CONSIDINE AND CHARLES RAY CONSIDINE,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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TABLE OF AUTHORITIES

Page

Cases:

Amos v. *Commissioner*, 43 T.C. 50, aff'd, 360 F. 2d 358 4

Armstrong v. *United States*, 354 F. 2d 274 4

Considine v. *Commissioner*, 68 T.C. 52 ..... 3, 4

Considine v. *United States*, Civ. No. 79-076-GT (S.D. Cal. Mar. 18, 1980), appeal pending, No. 80-5676 (9th Cir.) 3

Goodwin v. *Commissioner*, 73 T.C. 215 4

Kremer v. *Chemical Construction Corp.*, No. 80-6045 (May 17, 1982) 6

Montana v. *United States*, 440 U.S. 147 5

The Evergreens v. *Nunan*, 141 F. 2d 927, cert. denied, 323 U.S. 720 5

United States v. *Bishop*, 412 U.S. 346 4

United States v. *Considine*, 34 A.F.T.R. 2d para. 74-5116, aff'd, 502 F. 2d 246, cert. denied, 416 U.S. 970 2

United States v. *Pomponio*, 429 U.S. 10 4

Yates v. *United States*, 354 U.S. 298 5

Statute:

Internal Revenue Code of 1954 (26 U.S.C.):

Section 6653(b) 2, 4, 5
Section 7201 4
Section 7206(1) 2, 4, 5, 6

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The sole question presented in this federal income tax refund suit is whether petitioners were estopped from denying that petitioner Charles Ray Considine willfully filed false and fraudulent income tax returns for tax years 1966 and 1967.[1]

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[1]Petitioners have reproduced the Court of Claims' opinion as Appendix A to their petition. However, at page 10 of Appendix A, following the phrase "or 'evidentiary' facts," the following words were omitted:

> as important for collateral estoppel, we cannot agree with taxpayers' delineation of the "ultimate" facts shown in the earlier proceeding or to be shown in the present case.[12] Certainly, the knowing misstatement of income and of charitable deductions were "ultimate" facts.

The opinion of the Court of Claims is reported at 645 F. 2d 925 and the passage in question can be found at page 929 of that report.

1a. The relevant facts may be summarized as follows: Petitioners filed joint returns for the years 1965, 1966, 1967 and 1969. In May 1972, petitioner Charles Considine (hereinafter Considine) was indicted by a federal grand jury for willfully and knowingly making and subscribing false federal income tax returns for these years, in violation of Section 7206(1) of the Internal Revenue Code of 1954 (26 U.S.C.) (Pet. App. 3). On March 22, 1973, after a non-jury trial, Considine was convicted on all four counts of the indictment. In the criminal case the district court found that Considine had knowingly understated his interest income in 1966 by $9,975. In addition, the district court found that Considine had claimed a charitable contribution of $20,781.31 on the 1966 tax return, "whereas, as he then and there well knew, he was entitled to, at most * * * only $11,904.76, thereby overstating his contribution claim by $8,876.55," and that, in 1967, he had claimed a contribution carry-over of $3,028.21, "whereas, as he then and there well knew, he was not entitled to claim any portion thereof." *United States* v. *Considine*, 34 A.F.T.R. 2d para. 74-5116, at 74-5414 to 74-5415 (S.D. Cal. Mar. 22, 1973). The Ninth Circuit affirmed, and this Court denied certiorari on April 29, 1974. *United States* v. *Considine*, 502 F. 2d 246 (9th Cir. 1973), cert. denied, 416 U.S. 970 (1974).

The Commissioner of Internal Revenue subsequently issued statutory notices of deficiency for 1965-1967 and 1969, in which he asserted fraud penalties pursuant to Section 6653(b) of the Internal Revenue Code of 1954 (26 U.S.C.). For the years 1965, 1966 and 1967, petitioners paid the deficiencies and filed claims for refunds. The claims were denied and petitioners brought this suit for the years 1966 and 1967 in the Court of Claims (Pet. App. 3-4, 27).[2] In

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[2]Petitioners have contested the Commissioner's assertion of the civil fraud penalty for each of the four years, resorting to three different forums. This suit in the Court of Claims was for the years 1966 and

that court the parties stipulated that petitioners "had no additional deductions or credits, and that none of the items of income reflected on the returns are excludable." In addition, it was stipulated that if "collateral estoppel applies to the knowing understatement of income and overstatement of deductions, there would be underpayments within § 6653(c)(1)" (Pet. App. 14-15).

On cross-motions for summary judgment the Court of Claims held that Considine's conviction for filing false income tax returns for 1966 and 1967 barred petitioners from denying that Considine had knowingly falsified the amount of interest income and charitable deductions on such returns (Pet. App. 9-10). Because petitioners conceded that they had no deductions or exclusions that had been omitted from their returns, the court held that they were also estopped to deny that they had underpaid their taxes (*id.* at 14-15). Finally, considering the stipulated and undisputed facts showing that Considine possessed a high degree of sophistication in matters concerning taxation, the prior adjudication that he had knowingly understated his income and overstated his charitable deductions and the absence of any innocent explanation for his returns that did not entail relitigation of the prior determinations, the Court of Claims determined that the false returns had been filed with the

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1967. For the years 1965 and 1969, petitioners filed suit in the Southern District of California and in the Tax Court, respectively. In both of the latter proceedings the courts have held that Considine was estopped from relitigating issues determined in the criminal case: that he filed false and fraudulent income tax returns and willfully omitted interest income in 1965 (*Considine* v. *United States*, Civ. No. 79-076-GT (S.D. Cal. Mar. 18, 1980), appeal pending, No. 80-5676 (9th Cir.)) and that he filed false and fraudulent income tax returns and omitted capital gains income in 1969 (*Considine* v. *Commissioner*, 68 T.C. 52 (1977)).

intent to evade (Pet. App. 16-18). Accordingly, the court sustained the deficiencies determined for fraud penalties.[3]

2. The decision below is correct, and there is no conflict of authority or other circumstance warranting review by this Court.

Section 6653(b) of the Internal Revenue Code of 1954 (26 U.S.C.) provides that "[i]f any part of any underpayment * * * of tax * * * is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment." The specific intent required for imposition of the civil fraud penalty is interwoven within the definition of "willfully" contained in Sections 7201 and 7206(1) of the Code; and a criminal conviction under either section conclusively establishes for civil purposes that a fraudulent return was filed.[4] *Amos* v. *Commissioner*, 43 T.C. 50 (1964), aff'd, 360 F. 2d 358 (4th Cir. 1965); *Armstrong* v. *United States*, 354 F. 2d 274 (Ct. Cl. 1965); *Considine* v. *Commissioner*, 68 T.C. 52, 60 (1977); *Goodwin* v. *Commissioner*, 73 T.C. 215 (1979).

Because there is no suggestion that the issues were less than fully and fairly litigated in the criminal case, the Court of Claims correctly held that the district court's determination that Considine had knowingly omitted interest income and overstated charitable deductions—determinations that

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[3]Because the government had failed in the criminal case to prove beyond a reasonable doubt that the entire amount of the charitable contribution deduction taken by petitioners in 1966 had been falsely claimed as a charitable deduction (see page 2, *supra*) the Court of Claims remanded the case for the purpose of determining the precise extent of petitioners' liability for income taxes and fraud penalties (Pet. App. 19, 23-25). This issue was subsequently settled and judgment was entered (*id.* at 33-34).

[4]The meaning of the term "willfully" as employed in Section 7201 and 7206(1) is the same. The statutory term has been defined by this Court as "a voluntary, intentional violation of a known legal duty." *United States* v. *Bishop*, 412 U.S. 346, 360 (1973); *United States* v. *Pomponio*, 429 U.S. 10, 12 (1976).

were essential to his conviction under Section 7206(1)—estopped petitioners from denying that their 1966 and 1967 returns were false and fraudulent and that they had omitted interest income from their 1966 return and overstated charitable deductions on their 1966 and 1967 returns. *Montana* v. *United States*, 440 U.S. 147, 153-154 (1979). At least where, as here, petitioners stipulated that there were underpayments in tax resulting from the fraudulent entries on their returns and there was no suggestion of an innocent explanation, all the elements needed to sustain imposition of a fraud penalty under Section 6653(b) have been established, and the asserted penalty was correctly upheld.

3. Petitioners contend (Pet. 6-11), however, that collateral estoppel was improperly applied in this case, asserting that the doctrine has no application to a prior determination of "mediate" facts, but is limited instead to prior determinations of "ultimate" facts. As noted by the Court of Claims, however, even if petitioners' distinction between "ultimate" and "mediate" facts is accepted, "the knowing misstatement of income and of charitable deductions were 'ultimate' facts in the earlier criminal case" (645 F. 2d at 929; see page 1 note 1, *supra*).

Thus, petitioners' contention (Pet. 6-12) that the holding of the Court of Claims here conflicts with this Court's decision in *Yates* v. *United States*, 354 U.S. 298 (1957), and the Second Circuit's decision in *The Evergreens* v. *Nunan*, 141 F. 2d 927, cert. denied, 323 U.S. 720 (1944), is without merit. The Court of Claims properly took account of those decisions and recognized the absence of any conflict (see Pet. App. 10-12, 29 n.12, 30 n.14; see also page 1, note 1, *supra*). Both *Yates* (354 U.S. at 336) and *The Evergreens* (141 F. 2d at 928) hold that the doctrine of collateral estoppel makes conclusive in subsequent proceedings determinations of fact and mixed fact and law questions that were essential to the prior decision. Here, the district court

in the criminal case had found that Considine had knowingly falsified the amount of his interest income and the amount of the charitable deductions. These facts were essential to Considine's convictions under Section 7206(1) for willfully making returns "which he [did] not believe to be true and correct as to every material matter." They were accordingly properly regarded as "ultimate" facts, already determined, that petitioners were barred from relitigating here.

Petitioner appears to suggest (Pet. 9-10) that collateral estoppel can have no application because the facts necessarily determined in the criminal case, taken by themselves, did not, in the Court of Claims' view, establish all of the elements requisite for imposition of a civil fraud penalty. Acceptance of this contention would abolish the fundamental distinction between collateral estoppel (issue preclusion) and res judicata (claim preclusion). See *Kremer* v. *Chemical Construction Corp.*, No. 80-6045 (May 17, 1982), slip op. 5 n.6, 20 n.22.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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